

Whether the lining of Respondent's copper pipes with epoxy to cure a recurring pinhole leak problem, the installation or replacement of numerous valves, and the installation of new plumbing access panels, at a total cost of \$1.933 million, constitutes *maintenance, repair or replacement*, which Respondent's Board of Directors could authorize, or whether it constitutes an *addition, alteration or improvement* which, since it exceeded \$25,000, required approval by Respondent's unit owners?

The Commission accepted jurisdiction over the dispute and scheduled the dispute for a hearing. Both parties were represented by counsel at the hearing.

II. The Evidence

At the hearing, Comm. Ex. 1 was admitted in evidence without objection. That exhibit is the Commission's file in this matter, which includes Ms. Lee's initial complaint, relevant governing documents of Respondent, and the plumbing contract in question. Comm. Ex. 2 was also admitted without objection, which includes a legal brief submitted for Respondent and a pre-hearing order issued following a pre-hearing telephone conference among the Panel chair and counsel for both parties.

A. Complainant's Case-in-Chief

Complainant called herself and Luis Melara as witnesses in her case-in-chief.

Ms. Lee testified that she owns Condominium Unit 916 at 1111 University Boulevard, Silver Spring, Maryland. The condominium consists of two high-rise buildings, identified as 1111 and 1121 University Boulevard, built in the 1960s. Ms. Lee has lived in Unit 916 since November 2006. There are approximately 550 units within the condominium.

Ms. Lee testified that during the course of the plumbing project, the plumbing contractor, CuraFlo Mid Atlantic, Inc. ("CuraFlo"), cut into the drywall in her master bedroom and in her third bedroom and installed access panels and new plumbing valves. She understood that these valves were installed to control water flow not to her own unit but to neighboring units within the building. Installation of the access panels surprised her and was done without her permission.

When CuraFlo sought to replace valves in her kitchen, Ms. Lee objected and prevented them from doing so. This prompted a visit to her by several board members in mid-September 2008. During that visit, Ms. Lee complained that new valves in her bathroom were noisy, and that the valves proposed to be installed in her kitchen were of inferior quality to the existing valves. She also complained about the amount of money the project was costing.¹

¹ It is unclear from Ms. Lee's testimony whether the valves in her kitchen were eventually replaced. Based on testimony that the work in Building 1111 was completed, the Panel assumes the replacements were in fact made.

During her testimony, Ms. Lee identified three photographs she took, marked as Cmplt. Ex. 1, 2 and 3. Cmplt. Ex. 1 and 3 show a new access panel and valves installed in her third bedroom. Cmplt. Ex. 2 shows a new access panel and valve installed in her master bedroom. These exhibits were admitted without objection.

Ms. Lee also identified Cmplt. Ex. 4 as a memo sent by the Board in April 2008 to all unit owners. The memo, which was admitted without objection, refers to the plumbing project as “Capital Improvements” and an “[u]pgrading” of domestic water pipes.²

Finally, Ms. Lee identified Cmplt. Ex. 5 – a special assessment to which all unit owners were subject. Since Ms. Lee’s unit is in tier 16, her assessment was \$1,183.00. According to Cmplt. Ex. 5, the special assessment was to cover the plumbing project and roof work.

Ms. Lee testified that, in her view, the CuraFlo contract should have been submitted to all unit owners for approval and the Board’s failure to do so was a violation of UTC’s governing documents.

Ms. Lee admitted on cross-examination that the units were subject to easements giving the condominium association the right of access to her unit.

The next witness was Luis Melara. He testified that he has been the chief engineer at the condominium since July 2006. His responsibility is to take care of the property generally, including the plumbing. Typically, when a problem arises, a resident will call one of the front desks (there are two – one for each building), and the front desk will call him.

After about six months on the job, Mr. Melara became aware of pinhole leak problems in the domestic water supply. He testified that there were leaks throughout the buildings, in units, risers and hallways. In his words, the pinhole leaks were “everywhere” and problems occurred “every day, every hour.” Further, the condition of existing valves was poor. This meant that he often was unable to shut off the water to an individual unit or an individual fixture to repair the leak; instead, he had to shut off the water to an entire tier. This in turn generated complaints from residents.

² The Panel learned during the hearing that “domestic” water pipes are pipes that supply hot and/or cold water to sinks, showers, toilets, laundry facilities, etc., as distinct from waste pipes and as distinct from mechanical pipes for heating and cooling.

Mr. Melara testified that some of the units had access panels and valves prior to the CuroFlo work.

B. Respondent's Case-in-Chief

Respondent called Jim Mazzullo as its sole witness. Mr. Mazzullo testified that he is the president of CuroFlo – a local company authorized to do epoxy plumbing work in Maryland, Virginia, the District of Columbia and Delaware. He is a licensed master plumber and he serves on WSSC's plumbing advisory board. He has been in the plumbing business for more than 30 years.

Mr. Mazzullo testified that he is personally familiar with the work done at Building 1111.³ He said that UTC had a pervasive domestic water leak problem caused by pinhole leaks in the copper piping. He said that pinhole leaks could have a number of causes. For example, where different metals are connected, an electrical flow can occur, causing the pipe to deteriorate. The same thing can occur where copper piping passes through a metal stud, or where electrical cabling comes in contact with a pipe. The leaks occur as the pipes age and the deterioration continues.

He identified Rspnt. Ex. 1 – a copper “T” removed from Building 1111 – which contained extensive exterior mineralization. He explained that when the pinhole leak is small, a slow leak will deposit water on the exterior of the pipe, which evaporates leaving a mineral residue. In contrast, some leaks are larger and will cause water actually to spout from the pipe. A leak at the top of a riser might not show until the water reached the bottom of a riser, making it difficult to find the source of the leak.

Mr. Mazzullo described the process by which his company addressed the problem at UTC. First, he needed to “get control” of the plumbing system. This meant installing new valves in place of existing valves for two reasons. One, the existing valves were old and he could not be sure they would shut off the water flow reliably. Two, certain valves, such as those at the bases of risers, were not configured to allow him to hook up his equipment. Rspnt. Ex. 3 was admitted as an example of a double shut-off valve installed at the base of each of 19 risers in Building 1111.

In situations where there was no existing access to pipes, CuraFlow had to gain access by cutting into drywall and removing a section of pipe in order to hook up its

³ According the evidence, the work at Building 1111 has been completed and the work at Building 1121 is schedule to be completed in mid-2009.

equipment. Once all work was completed, CuraFlo then installed a ball valve and an access panel. Rspnt. Ex. 2 was an example of this type of valve. These access cuts were done through drywall, which is easier and cheaper to repair than tile. Once a new valve is installed, applicable plumbing codes require that it be accessible through an access panel. Mr. Mazzullo testified that Cmplt. Ex. 1, 2 and 3 are examples of this type of work.⁴

Mr. Mazzullo testified that in two-thirds of the units in Building 1111 access panels and valves already existed. In the remaining one-third, his company had to cut new access panels.

In a further step to gain control of the plumbing system, CuroFlo removed the “angle stop” valves that control water supply to sinks and toilets, and temporarily replaced them with a device that allowed the company’s equipment to be hooked up. Once the work was completed, a new angle stop valve, such as Rspnt. Ex. 4, was installed.

Another reason why existing valves were replaced with new ones was that, upon conclusion of the work, CuraFlo had to test the entire system for leaks. Old valves tend not to work properly, according to Mr. Mazzullo, making it difficult to do the testing.

Once CuroFlo got control of the domestic water supply system, it blew hot, dry air through the system. It then blew a garnet abrasive through the system to clean it and prepare the interior surfaces of the pipes. Finally, it injected an epoxy material to coat the interior surfaces. According to Mr. Mazzullo, this has stopped the pinhole leak problem at Building 1111.

An alternative to the epoxy treatment would have been to replace all existing copper piping. This in turn would have required opening up many walls. Mr. Mazzullo did not specifically price such work at UTC, but he estimated that it would cost between \$6 and \$9 million.

Mr. Mazzullo testified that CuraFlo’s work required permits from WSSC, which is the regulatory authority for plumbing work in Montgomery County. The permits were admitted in evidence without objection as Rspnt. Ex. 5 and 6. Mr. Mazzullo said these were “repair” permits, not permits for new work, and that WSSC charged a

⁴ Mr. Mazzullo explained that Rspnt. Ex. 2 was a 1” ball valve, similar to those shown on Cmplt. Ex. 1 and 2 except that the valves shown in those exhibits were ½” ball valves.

“maintenance” fee, not a “new work” fee, for the permits. Had the project been considered new work, much more extensive inspections would have been required, according to Mr. Mazzullo.

Rspnt. Ex. 7 and 8 (relevant portions of WSSC’s plumbing code and the International Plumbing Code) were admitted in evidence without objection during Mr. Mazzullo’s testimony, as was a portion of the International Building Code – Rspnt. Ex. 9.

In Mr. Mazzullo’s opinion, the work under CuraFlo’s contract with UTC was maintenance work. He supported this by stating that more than 99% of the original piping still exists, although that piping is now coated with an epoxy that has stopped the pinhole leaking. He acknowledged that the system now works better.

On cross-examination, Mr. Mazzullo admitted that the WSSC permits do not specifically identify the work as repair or maintenance.

At the conclusion of the hearing, the Panel acknowledged receipt of Respondent’s hearing brief and asked whether counsel for Complainant would also like to submit a brief. Counsel for Complaint gave a short argument on his view of relevant case law but said he did not wish to submit anything further. The record was then closed.

III. Findings of Fact

The Panel finds the following facts:

1. UTC is a condominium within the meaning of Md. Code Ann., Real Prop. § 11-101 *et seq.*, and is a common ownership community as that term is used in Chapter 10B of the Code.
2. Ms. Lee owns and occupies a unit within UTC. As an owner, she enjoys the benefits and is subject to the obligations set forth in UTC’s governing documents.
3. UTC’s By-Laws contain the following provisions:

ARTICLE III BOARD OF DIRECTORS

Section 1. Number and Qualification. The affairs of the Association shall be governed by a Board of Directors . . .

Section 2. Powers and Duties. The Board of Directors shall have and shall exercise the powers and duties of the Association . . . and may do all such acts and things except as . . . may not be delegated to the Board of Directors by the Unit owners. Without limiting the generality of the foregoing, the Board of Directors' powers shall include the following:

(a) Operation, care, upkeep and *maintenance* of the common elements.

(b) Determination of the common expenses required for the affairs of the Association.

(c) Collection of the common charges and expenses from the Unit owners.

* * *

(h) Making of *repairs*, additions, *replacements* and improvements to or alterations of the common elements in accordance with other provisions of these By-Laws after damage or destruction by fire or other casualty . . .

ARTICLE V OPERATION OF THE PROPERTY

Section 14. Additions, Alterations or Improvements by Board of Directors. Whenever in the judgment of the Board of Directors the common elements shall require *additions*, *alterations* or *improvements* costing in excess of Twenty-Five Thousand Dollars (\$25,000.00), and the making of such additions, alterations or improvements shall have been approved by more than fifty percent (50%) in voting interests of the Unit owners . . ., the Board of Directors shall proceed with such additions, alterations or improvements . . .

Comm. Ex. 1 at p. 67 and following (italics added).

4. By 2006, UTC had a pervasive pinhole leak problem in its domestic water supply system.

5. Due to the age of UTC's buildings and the condition of the domestic water supply system within the buildings, it became increasingly difficult, if not impossible, for UTC's regular engineering staff to repair the pinhole leaks on a leak-by-leak basis.

6. On or about April 16, 2008, UTC's Board of Directors approved a contract with CuraFlow to provide an epoxy lining to the domestic water supply system. Notice dated Apr. 23, 2008, Comm. Ex. 1 at p. 152.

7. The CuraFlo contract (Comm. Ex. 1 at p. 154 and following) stated a total contract price of \$1,933,000.00, of which \$1,037,000.00 was allocated to the work at Building 1111 and the remainder was allocated to the work at Building 1121.

8. The CuraFlow contract was not submitted to or approved by UTC's unit owners. Stip. #3 in Pre-Hearing Order, Comm. Ex. 2.

9. CuraFlow has completed the epoxy work under the CuraFlo contract at Building 1111 and the work at Building 1121 is scheduled for mid-2009.

10. The work under the CuraFlo contract included replacement of many valves with new valves and installation of some new valves and access panels where none existed before.

11. Replacement of existing valves, and installation of new valves, were necessary (a) in order for CuraFlo to gain access to the plumbing system with its equipment, and (b) to be sure that the valve worked properly during epoxy application and testing.

12. An access panel is required by Code whenever a new valve is installed.

13. The work undertaken and to be undertaken under the CuraFlo contract was a reasonable response to the pinhole leak problem.

14. Other methods of addressing the pinhole leak problem, such as making repairs on a leak-by-leak basis, or replacing the entire domestic water supply system, would have been impractical, more disruptive, and/or substantially more costly.

15. CuraFlo's work has cured the pinhole leak problem in Building 1111.

16. More than 99% of the original domestic water supply system, as it existed prior to CuraFlo's work, remains following CuraFlo's work.

17. The domestic water supply system in Building 1111 is a better system, with greater functionality, as a result of CuraFlo's work. The Panel assumes the same would be true upon completion of CuraFlo's work in Building 1121.

IV. Conclusions of Law and Discussion

The Panel concludes that the work under the CuraFlo contract was "maintenance," "repair" or "replacement" as those terms are used in UTC's By-Laws and that the Board of Directors had authority to enter into the CuraFlo contract without approval of the unit owners.

The By-Laws do not define the terms "maintenance," "repair" or "replacement" nor do they define "addition," "alteration" or "improvement." Absent any indication that these terms were intended to have some special meanings, they should be interpreted according to their customary, ordinary, and accepted meanings. *Cochran v. Norkunas*, 398 Md. 1, 17 (Md. 2007). *See, Kobrine, L.L.C. v. Metzger*, 151 Md. App. 260, 275 (Md. App. 2003) (condominium governing documents are interpreted using contract principles).

Merriam-Webster's online dictionary, <http://www.merriam-webster.com/dictionary>, contains the following relevant definitions:

maintenance – the upkeep of property or equipment
repair – to restore to a sound or healthy state
replace – to put something new in the place of
addition – a part added, as to a building
alteration – modification
improvement – something that enhances value [⁵]

⁵ The manner in which such terms are used for regulatory purposes in building codes and by permitting authorities is not controlling in interpreting UTC's By-Laws.

With these definitions in mind, the Panel concludes that the purpose of the work under the CuraFlo contract was to keep up the domestic water supply system and restore it to a sound state, not to add to, modify, or improve the system.

The Panel recognizes that there were “additions” to the system in the form of new valves and access panels and that, as a result, the system was “improved.” But in the Panel’s view, these were minor, incidental changes made either to enable CuraFlo to do its work, or as required by Code. More than ninety-nine percent of the original plumbing system remains and the overall appearance and functionality of the system is substantially the same.

Buttressing the Panel’s conclusion is the fact that the work was undertaken in response to deterioration of a critical, existing system. As Mr. Melara testified, the leaks were “everywhere” and occurring “every day, every hour.” Mr. Mazzullo described the problem as “pervasive.” Making repairs on a leak-by-leak basis was no longer effective and a system-wide approach was needed. In short, the work was not intended to provide a new amenity, such as installation of tennis courts where none had existed before, but to return an existing system to functionality.

There does not appear to be any case in Maryland or elsewhere dealing specifically with CuraFlo’s epoxy approach to pinhole leaks as either maintenance/repair/replacement or addition/alteration/improvement. Two recent Maryland cases, however, are instructive.

In *Garfink v. Cloisters at Charles, Inc.*, 392 Md. 374, 401-02 (Md. 2006), an existing clothes dryer vent serving a condominium unit was inadequately installed and did not comply with Code. The question was whether the unit owner’s installation of a new, exterior vent in compliance with Code violated the condominium’s governing documents, which prohibited unit owners from “alter[ing], mak[ing] additions to, or chang[ing] the appearance of the common elements, or the exterior appearance of a unit or any other portion of the condominium.” The Court of Appeals ruled that this was a repair, which the unit owner was authorized to make without condominium association approval.

Similarly, in *Blamberg v. Council of Owners of Saltaire at Annapolis Condominiums*, Anne Arundel Cnty. Cir. No. C-07-123365 (decided Dec. 31, 2008), the condominium project involved in the case was in a serious state of disrepair. After obtaining a report from an engineering company, the condominium’s board, acting

without approval of the council of unit owners, contracted for work costing \$1.3 million to fix leaking roofs and chimneys, replace rotted wood, replace siding, and reconfigure entrance ways and signage. A unit owner objected to the resultant assessment on the basis that only the council could authorize the work. The Circuit Court held that the work (with the single exception of the entranceway reconfiguration) was maintenance, repair and replacement, not additions, alterations and improvements.

In each of the following cases, all outside Maryland, the court concluded that the work in question fell into the maintenance/repair/replacement category within the authority of the community's board of directors: *Ralph v. Envoy Point Condo. Ass'n, Inc.*, 455 So.2d 454 (Fla. App. 1984) (extension of existing sea wall); *Council of Dorset Condo Apartments v. Gordon*, 801 A.2d 1 (Del. 2002) (replacement of parking deck with superior, waterproof surface); *City of Tulsa v. Raintree Estates I, Inc.*, 162 P.3d 929 (Ok. App. 2007) (restoration following partial condemnation, including installation of sound barrier and new entrance way configuration); *Bonderman v. Naghie*, 2005 WL 1663469 (Mass. Land Ct. 2005) (new masonry facade incorporating thermal expansion joints which old facade lacked); *Behm v. Victory Lane Unit Owners' Ass'n, Inc.*, 728 N.E.2d 1093 (Ohio App. 1999) (foundation underpinning to restore building's structural integrity); *Litvak v. 155 Harbor Drive Condo Ass'n, Inc.*, 614 N.E.2d 190 (1993) (replacement of old roof with "virtually identical" new one). *But see George v. Beach Club Villas Condo. Ass'n*, 833 So.2d 816 (Fla. App. 2002) (change from cedar roof shingles to terra cotta tiles was a substantial, material alteration).

The clear weight of authority supports the view that changes and upgrades to a common element in the course of repairing or replacing the element does not convert the repair or replacement to an alteration or improvement. In *Bonderman*, for example, the trustees of a condominium association imposed a \$6 million special assessment (about \$32,000 per unit) to cover a variety of projects. One of the unit owners challenged the assessment on the basis that the underlying work constituted improvements that should have been, but were not, approved by the unit owners. The court responded:

That the challenged work may add elements or features to the condominium common areas which were lacking previously, does not, by itself, bring the project within the realm of an improvement. For example, the new facade is expected to include thermal expansion joints – technology that will accommodate expansion and contraction caused by moisture and temperature changes. The old facade lacked such a system. The new system could well be necessary to extend the life of the facade and

prevent reoccurrence of the current facade failures. The Trustees need not repair or restore each element of the common area to its particular preexisting condition, out of fear that doing otherwise might cause the work to be classified as an improvement. At the end of the project, a repaired and restored facade, even with modern components like the expansion joints, will still be a masonry facade on the same buildings.

Bonderman, 2005 WL 1663469 *4. Here, a repaired and restored water supply system, even with new and additional valves and access panels, is still a water supply system in the same building.

That UTC's Board itself characterized the work as a capital improvement in a memo to unit owners is not, of itself, dispositive. The memo can be seen as a public relations effort to ease the pain of the substantial special assessment associated with the work. Despite the characterization, the Board obviously felt it had authority on its own to execute the CuraFlo contract, and the Panel agrees.

V. Order

Based on the foregoing findings and conclusions, it is by the Panel, this 8th day of April, 2009, ORDERED as follows:

1. The relief requested by Complainant is DENIED.
2. The Complaint is DISMISSED WITH PREJUDICE.

Panel members Staci Gelfound and Karen Kali concur in this decision.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court for Montgomery County, Maryland within thirty (30) days after this Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.

Charles H. Fleischer, Panel Chair
Commission on Common Ownership Communities